No. 80-195

IN THE DEC

Supreme Court of the United States

October Term, 1980

METROMEDIA, INC.,

Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation, et al.,

Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC.,

Appellant,

v.

THE CITY OF SAN DIEGO, a municipal corporation, et al.,

Appellees.

On Appeal From The Supreme Court Of California

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

STATEMENT OF THE CASE

1. The Ordinance

On March 14, 1972, the City Council of The City of San Diego adopted Ordinance No. 10795 (New Series)[1] ("the ordinance"), an ordinance prohibiting and abating, with enumerated exceptions, all off-site outdoor advertising display signs in the City of San Diego except for certain circumstances specified in subsection G of the ordinance.[2]

The types of signs excepted from the prohibition of the ordinance, in addition to various governmental, historical, religious, time and temperature, for sale, rent or lease, and signs being manufactured, include: bus bench signs, signs within malls, courts, arcades, etc., not visible from the boundary of the premises, signs on public transportation vehicles, signs on vehicles and trailers, temporary subdivision directional signs under special permit, and temporary political campaign signs.[3]

The ordinance is contained in Chapter X ("Planning and Zoning") of the San Diego Municipal Code and recites as its purpose: to eliminate excessive and confusing signs not related to the premises on which they are located; to eliminate hazards to pedestrians and motorists; to ensure signs are used as identification and not advertisement; to preserve and protect the appearance of the city; to protect the tourist industry by preventing the destruction of the natural beauty and environment of the

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1 Jurisdictional Statement Appendix G (J.S.App.) 104a-118a.

2 J.S.App. 112a-113a.

3 J.S.App. 111a-112a.

city; to safeguard and enhance property values; and to protect public and private investment in buiidings and open space.[4]

2. The Litigation

Appellants, two companies in the outdoor advertising business in San Diego (hereinafter collectively referred to as "Metromedia"), filed actions challenging the validity of the ordinance in the Superior Court against appellees (hereinafter collectively referred to as "City") soon after it was enacted.

The actions were consolidated and each side brought a motion for summary judgment against the other.[5] In addition to a stipulation of facts, the City's motion was also based upon Metromedia's answers to interrogatories, matters subject to judicial notice and declarations pursuant to California law.[6]

The Superior Court denied City's motion for summary judgment and granted Metromedia's, declaring the ordinance invalid and enjoining City from enforcing it.

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[4] J.S.App. 106a-107a.

[5] In California summary judgment procedure is entirely statutory and is governed by Code of Civil Procedure Section 437c. The motion is appropriately granted in a case where no triable issue of fact exists and where the issue is one of law. *Stationers Corp. v. Dun & Bradstreet, Inc.*, 62 Cal.2d 412, 417 (1965); *Loma Portal Civic Club v. American Airlines*, 61 Cal.2d 582, 588 (1964). The moving party has the burden of demonstrating that there is no triable issue as to any material fact and that the opposing party's case is without merit. *Vesely v. Sager*, 5 Cal.3d 153, 169 (1971); *Residents of Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal.App.3d 117 (1973). The motion is to be supported or opposed by affidavits, declarations, admissions, answers to interrogatories, depositions and matters subject to judicial notice. Code of Civil Procedure Section 437c.

[6] Clerk's Transcript (C.T.) 766-776; 1017-1024.

The California Supreme Court reversed the judgment of the trial court and upheld the ordinance as a proper application of municipal authority over zoning and land use for the purpose of promoting the public safety and welfare.

As to the traffic safety objectives sought to be achieved by the ordinance, the California Supreme Court stated: "We hold as a matter of law that an ordinance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety."[7] The Court further held that the aesthetic objectives of the ordinance were sufficient in themselves to sustain the ordinance.[8]

The decision below also rejected Metromedia's First Amendment attack on the ordinance as well as other asserted illegalities, but agreed with Metromedia in holding that the ordinance is partially preempted by state law as to removal of certain billboards without compensation.[9]

Because the ordinance does not define the term "outdoor advertising display signs" the decision below adopted a narrow construction of the signs proscribed by it by relying on a definition found in the California Revenue and Taxation Code as follows:

> . . . a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public.
>
> Cal.Rev. & Tax. Code, Section 18090.2.

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[7] J.S.App. 7a.

[8] J.S.App. 9a.

[9] City's conditional petition for writ of certiorari to review this portion of the decision based upon 23 U.S.C. Section 131 is currently pending in this Court (No. 80-196).

SUMMARY OF ARGUMENT

1. The Ordinance Is A Proper Application Of Municipal Authority Over Land Use And Zoning To Promote The Public Safety And General Welfare

An ordinance restricting land use is valid under the police power if it has a real or substantial relation to public health, safety, morals or general welfare. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1973).

Purposes sought by this ordinance include elimination of traffic hazards and aesthetic enhancement. The Court has held such purposes are within the police power. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 129 (1978); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443 (1978).

In arguing that there is no substantial relationship between the ordinance and those objectives sufficient to justify a ban on its business, Metromedia ignores established rules of judicial review of legislation and the record.

Legislation is entitled to a presumption of validity and the burden is on the party attacking it. *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

The Court has long established a rule of judicial deference to legislative judgment as to what measures are necessary to promote the public good. *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927).

Metromedia has not met its burden of proof in challenging the ordinance on due process grounds. Instead it attempts to shift the burden to City by relying on the City's failure of proof. Even if Metromedia is correct in arguing that the burden shifts to City because First Amendment rights are asserted, it has not demonstrated, as it must under California summary judgment law, that there is no relationship between the ordinance and its stated objectives.

Metromedia concedes that its signs are designed to attract the attention of motorists on streets and highways and that they do so. In view of that, the California Supreme Court was correct in concluding as a matter of law that the prohibition of billboards relates to the permissible objective of traffic safety. Other state courts have reached a similar conclusion.

Nor is the fact that the ordinance prohibits Metromedia's type of signs of controlling significance. This Court has not been persuaded by any purported distinction between "regulation" and "prohibition," for any regulation can be so characterized. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962).

2. The Ordinance Is A Time, Place And Manner Regulation And Is Not Based Upon Content Of Speech

It is settled that reasonable regulations of the time, place or manner of constitutionally protected speech, where necessary to further significant governmental interests, are permitted by the First Amendment. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 64, n. 18 (1976).

In reviewing such a restriction, the Court has established three criteria: (1) it must be justified without reference to the content of speech; (2) it must serve a significant governmental interest; and (3) it must leave open ample alternative channels for communication of the information. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976).

The subject ordinance does not seek to prohibit any particular message and its objectives are unrelated to content of an advertisement. It is the means of use of billboards (permanent structures and signs adjoining highways to attract the attention of motorists) which is sought to be prohibited.

The signs excepted from the ordinance are used differently than billboards and the exceptions are not based on content of the message.

The Court, while holding that commercial speech is not totally outside of the First Amendment's protection, has not discarded distinctions based on the content of speech. Commercial speech is afforded a lesser degree of protection. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978).

Here, although some noncommercial messages are used on billboards, they are merely incidental to a commercial means of exploiting speech.

Billboards have long been recognized by the courts to create special problems and to rely upon a captive audience, thus invading rights of privacy. *Thomas Cusack Co. v. Chicago*, 242 U.S. 526, 529 (1916); *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932).

The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

3. The Ordinance Serves Significant Governmental Interests

The objectives here serve significant governmental interests and the particular term used in describing them is not crucial. *United States v. O'Brien*, 391 U.S. 367, 376-377 (1967).

4. Alternative Channels Of Communication Are Available

City has not stipulated that there are no adequate alternative means of communication. The stipulation was simply intended to mean that in some instances some problems may exist with alternatives.

There are many forms of signs allowed by the ordinance, *e.g.*, on-site signs, bus bench signs, signs within malls and courts and signs on vehicles, in addition to other media.

Cases cited by Metromedia requiring narrowly drawn regulations are inapposite here. Those cases involved more transitory means of communication, not permanent structures and signs. Any regulations which would serve the objectives would in effect render them usable only as the permitted signs which Metromedia claims are inadequate.

ARGUMENT

I

THE ORDINANCE REPRESENTS A VALID EXERCISE OF THE POLICE POWER AND DOES NOT VIOLATE THE FOURTEENTH AMENDMENT

A. The Ordinance Represents A Proper Application Of Municipal Authority Over Land Use And Zoning To Promote The Public Safety And General Welfare

An ordinance restricting land use is valid under the police power if it has a real or substantial relation to the public health, safety, morals or general welfare. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 303 (1926); *Village of Belle Terre v. Boraas, supra*, 416 U.S. 1.

Among the purposes recited to be sought by the subject ordinance are the elimination of traffic hazards and the improvement of the appearance of the city.

This Court has left little doubt that such purposes are proper objectives for the exercise of the police power. *Penn Central Transportation Co. v. City of New York, supra*, 438 U.S. 104, 129; *Raymond Motor Transportation, Inc. v. Rice, supra*, 434 U.S. 429, 443.

Metromedia argues that there is no real or substantial relationship between the ordinance and traffic safety or aesthetics sufficient to justify a flat ban on its business. In doing so, Metromedia ignores established rules of judicial review of legislation and the record below.

Legislation enacted pursuant to the police power is entitled to a presumption of validity and the burden is on the party attacking it. *Kelley v. Johnson, supra*, 425 U.S. 238, 247; *Erie Railroad Co. v. Williams*, 233 U.S. 685, 699 (1913).[10] As was stated in *Kelley v. Johnson, supra*, 425 U.S. 238, 247:

> . . . the question is not . . . whether the State can "establish" a "genuine public need" for the specific regulation. It is whether respondent can demonstrate that there is no rational connection between the regulation . . . and the promotion of [its objectives].

This Court has long ago established a rule of judicial deference to the legislative judgment as to what measures will promote the public health, safety or general welfare, stating with regard to a challenge to a zoning ordinance:

> The most that can be said is that whether that determination was an unreasonable, arbitrary or unequal exercise of power is fairly debatable. In such circumstances the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.
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> *Zahn v. Board of Public Works, supra*, 274 U.S. 325, 328.

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[10] See also *Goldblatt v. Town of Hempstead, supra*, 369 U.S. 590, 596. In connection with legislation having traffic safety as its objective the court has described it as a "strong presumption of validity." *Raymond Motor Transportation, Inc. v. Rice, supra*, 434 U.S. 429, 444, citing *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 524 (1959).

Recently it was stated that the rule in *Zahn* remains viable today. *Moore v. City of East Cleveland*, 431 U.S. 494, 514, n. 1 (1977) (Mr. Justice Stevens concurring).

In applying this rule the Court has stated on many occasions in various ways that it will not go behind the legislative determination and engage in a weighing of the evidence or considerations of necessity:

> Whether the manufacture of oleomargarine . . . involves such danger to the public health as to require . . . the entire suppression of the business, rather than its regulation . . . are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts.
>
> *Powell v. Pennsylvania*, 127 U.S. 678, 685 (1888).
>
> . . . courts cannot go behind [the municipal authorities'] finding and inquire into local conditions; or whether the defendant's [pool] hall was an orderly establishment, or had been conducted in such a manner as to produce the evils sought to be prevented.
>
> *Murphy v. California*, 225 U.S. 623, 629 (1911).
>
> Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable. . . . As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.
>
> *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938).

> . . . it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . It is enough that there is evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487-488 (1955).
>
> Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a "super-legislature to weigh the wisdom of legislation," . . .
>
> *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963).

In reviewing legislation which is challenged as violating due process under the Fourteenth Amendment this Court has said:

> . . . the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.
>
> *Nebbia v. New York*, 291 U.S. 502, 525 (1933).

More recently the Court has reviewed the scope of judicial review of zoning ordinances and citing the case of *Village of Euclid v. Ambler Realty Co., supra*, 272 U.S. 365, it was stated:

> . . . Mr. Justice Sutherland fused the two express constitutional restrictions on any state interference with private property--that property shall not be taken without due process nor for a public purpose without just compensation--into a single standard: "[B]efore [a zoning] ordinance can be declared unconstitutional, [it

> must be shown to be] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." . . .
>
> With one minor exception,[2] between the *Nectow* decision in 1928 and the 1972 decision in *Village of Belle Terre v. Boraas* . . . this Court did not review the substance of any zoning ordinances.
>
> *Moore v. City of East Cleveland, supra*, 431 U.S. 494, 515 (Mr. Justice Stevens concurring).

The minor exception cited in note 2 in the above quote is the case of *Goldblatt v. Town of Hempstead, supra*, 369 U.S. 590. Although the Court in *Goldblatt* stated that the validity of the ordinance in question (prohibiting excavations below the water table and requiring the refilling of those that are) may depend upon facts relating to its reasonableness, it concluded that the challenger had not met its burden and upheld the ordinance. In its opinion the Court recited the rule that debatable questions as to reasonableness are not for the courts but for the legislature (at p. 595) and stated that:

> [An] exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it.
>
> *Id.* at 596.

In *Moore v. City of East Cleveland, supra*, 431 U.S. 494, the Court reviewed a zoning ordinance which selected only certain categories of relatives which were defined as a "family" and entitled to cohabitate in certain dwellings. The Court held that such legislation intrudes on choices concerning family living arrangements thereby distinguishing the *Belle Terre* and *Euclid* cases stating, "the usual judicial deference to the legislature is inappropriate." (*Id.* at 498-499.) In doing so the Court counseled caution and restraint in utilizing a test of substantive due

process, citing the history of the *Lochner* era. (*Id.* at 502-503.)[11] The Court then determined that although the governmental goals sought were legitimate, it was obvious from the face of the ordinance that the means used had but a tenuous relation to them since the same evils would result from the category of family members which were allowed to live together. (*Id.* at 500.)

Thus, even in those limited instances where the Court has purported to engage in a weighing or balancing analysis it has done so only where it is clear that the legislation had a very slight or no effect in achieving its objectives.[12]

Metromedia has not met its burden of proof in challenging the ordinance on due process grounds. Instead it erroneously attempts to shift the burden to City by relying on the City's failure of proof.[13] Metromedia is simply wrong in its assertion (Jur. Stmt. 25) that the record demonstrates there is no relationship between the ordinance and the traffic safety objective. In support of said assertion Metromedia points to City's response to an interrogatory propounded in discovery proceedings asking for the names of every person known to City who

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[11] Cf. *Andrus v. Allard*, 444 U.S. 51, 68, n. 25 (1979) where the Court refused to exhume a varient of the theory of substantive due process.

[12] See *Delaware v. Prouse*, 440 U.S. 648, 659-661 (1979); *Bibb v. Navajo Freight Lines, supra*, 359 U.S. 520, 524; *Raymond Motor Transportation, Inc. v. Rice, supra*, 434 U.S. 429, 443-444. In each case it was either obvious from the face of the legislation or otherwise made clear that it did not serve to achieve the objectives sought and it is thus questionable that any weighing took place at all.

[13] Nothing in support of Metromedia's motion for summary judgment was offered to demonstrate there was no triable issue of fact on the issue of whether the objectives were served by the ordinance. City asked the trial court to judicially notice commonly known facts with respect to distractions and traffic accidents (C.T. 766-767).

has suffered any physical injury as a result of Metromedia's signs.[14] City's response was to the effect that such information was then unknown.

From this response Metromedia argues that this constitutes a "conceded absence of any factual basis." Obviously such a conclusion does not follow. Because the City did not know of a specific accident related to billboards at the time the answer was given does not mean that such an accident has never occurred or is not likely to occur. Such a relationship may be established by studies, expert opinion or even by commonly known facts. Metromedia also takes City's answer out of context by ignoring City's further response which identifies studies concluding that a causal relationship between billboards and traffic accidents exists.[15]

Furthermore, City would not have been precluded, if the specifics of an accident caused by billboards came to its attention subsequent to its answer to the interrogatory, from using such evidence at trial.[16]

On the other hand, Metromedia has conceded in its answers to City's interrogatories that its signs are designed to, and do in fact attract the attention of motorists on public streets and highways;[17] and, as the California Supreme Court concluded, as a matter of law an ordinance

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14 C.T. 391-393.

15 C.T. 64 and 392, citing "Final Report On The Comprehensive Evaluation of Highway Sign and Billboard Regulations" by Ohio Department of Highways in cooperation with the United States Department of Commerce Bureau of Public Roads (1967) and "A Study of the Relationships Between Advertising Signs and Traffic Accidents on U.S. 40 Between Vallejo and Davis" by D. Jackson Faustman (1961).

16 *Singer v. Superior Court*, 54 Cal.2d 318, 324-325 (1960).

17 C.T. 145-146, 488-489.

which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety.[18]

In *E. B. Elliot Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141, 1152 (5th Cir. Fla. 1970), cert. den. 400 U.S. 805 (1970), the court reached the same conclusion stating:

> The appellants argue that Ordinance No. 63-26 bears no reasonable relationship to highway safety, relying on the testimony of highway safety experts whose studies revealed no discernible correlation between the placement of outdoor advertising signs along limited access highways, as here involved, and the occurrence of automobile accidents. Even so, we are unable to say that the Board of County Commissioners of Dade County was unreasonable in basing the ordinance, at least partially, on highway safety. The essential purpose of an advertising sign placed adjacent to a highway is to attract the attention of the motoring public long enough to convey a commercial message.
>
> Conceding that the message presented by an average sign can be comprehended by a motorist of average intelligence in an insignificant amount of time, and that eye movement improves the alertness of an expressway driver, the speed and density of modern expressway traffic, coupled with the braking limitations of the modern automobile, can conceivably make even the most insignificant amount of time during which a driver's attention is diverted a matter of direst consequences.

Similarly the court in *Moore v. Ward*, 377 S.W.2d 881, 884 (Ky. 1964) concluded:

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18 J.S.App. 7a.

> . . . Even assuming appellants could produce substantial evidence that billboard signs do not adversely affect traffic safety, this record indicates, and our common knowledge suggests, that the question involves so many intangible factors as to make debatable the issue of what the facts establish. Where this is so, it is not within the province of courts to hold a statute invalid by reaching a conclusion contrary to that of the legislature.[19]

As this Court stated in *Railway Express Agency, Inc. v. People of the State of New York*, 336 U.S. 106, 109 (1949):

> We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.

Thus the California Supreme Court was correct in holding that the ordinance serves objectives of traffic safety and improving the aesthetic qualities of the city.

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[19] Other cases in accord: *New York State Thruway Auth. v. Ashley Motor Corp.*, 10 N.Y.2d 151, 176 N.E.2d 566, 568 (1961); *Opinion of the Justices*, 103 N.H. 268, 169 A.2d 762, 764 (1961); *City of Escondido v. Desert Outdoor Adv., Inc.*, 8 Cal.3d 785, 790 (1973); *State of Washington v. Lotze*, 92 Wash.2d 52, 593 P.2d 811, 813-814 (1979), app. dism. 444 U.S. 921 (1979); *Newman Signs, Inc. v. Hjelle*, 268 N.W.2d 741, 757 (N. Dakota 1978); dism. 440 U.S. 901 (1979); *Metromedia, Inc. v. City of Pasadena*, 216 Cal.App.2d 270, 279 (1963) (notwithstanding evidence that billboards were useful and of economic benefit, were less expensive than other forms of advertising, had won art awards, were an accepted use of land and had no measurable causal connection with traffic accidents). Additionally, City requested the trial court to judicially notice commonly known facts relating to distractions and traffic safety which show a relationship between billboards and accidents (C.T. 781). See also Dowds, *Private Signs and Public Interests*, Institute on Planning, Zoning and Eminent Domain, p. 231 (1974).

B. The Ordinance Is Not Invalid Because It Prohibits Appellant's Business

Metromedia attempts to deal with the aesthetic objectives of the ordinance by arguing that such objectives cannot justify a flat ban on its business.[20]

First, it is important to note that Metromedia is incorrect in stating that the ordinance prohibits all outdoor advertising in the City of San Diego. The ordinance applies only to off-site outdoor advertising signs and excepts many types of off-site outdoor advertising signs from its prohibition. Second, contrary to Metromedia's argument, there is no super-added limitation on a valid exercise of the police power that it cannot be utilized to prohibit a business.

Any purported distinction between prohibition and regulation is merely one of words, not substance. In determining whether an enactment constitutes a prohibition or a regulation, the categorization of the subject used as a frame of reference predetermines the conclusion.[21] For example, Metromedia takes the position that "outdoor advertising" is being prohibited, while City contends that the ordinance regulates signs by limiting them to on-site locations[22] and certain types of off-site signs. Any regulation can be characterized as a prohibition to the extent of its proscriptive effect.

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[20] Metromedia also contends that such a rationale is unreasonable and arbitrary. Such arguments have been rejected by this Court. *Penn Central Transportation Co. v. City of New York, supra,* 438 U.S. 104, 132-133; *Powell v. Pennsylvania, supra,* 127 U.S. 678, 686.

[21] See *In the Matter of Cromwell v. Ferrier,* 19 N.Y.2d 263, 225 N.E.2d 749, 752 (1967).

[22] San Diego regulates on-site or business signs through a separate ordinance (San Diego Ordinance No. 11000 [New Series], as amended by Ordinance No. 11718 [New Series] which comprehensively regulates location, type, size, numbers, etc., of signs. See *United Business Commission v. City of San Diego,* 91 Cal.App.3d 156 (1979).

This Court has rejected any such distinction stating:

> . . . Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.
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> *Goldblatt v. Town of Hempstead, supra*, 369 U.S. 590, 592.[23]

This Court has also upheld prohibitions of businesses in many instances,[24] and several other courts have upheld prohibitions of billboards.[25] Furthermore, such a prohibition may be justified under a

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[23] In accord: *Ferguson v. Skrupa, supra*, 372 U.S. 726, 732; *Breard v. Alexandria*, 341 U.S. 622, 631-632 (1951); *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949); *John Donnelly & Sons, Inc. v. Outdoor Adv. Bd.*, 339 N.E.2d 709, 715 (Mass. 1975).

[24] *Breard v. Alexandria, supra*, 341 U.S. 622, 632-633; *Nebbia v. New York, supra*, 291 U.S. 502, 528, and cases cited in note 26 therein.

[25] *John Donnelly & Sons v. Mallar*, 453 F.Supp. 1272 (Me. 1978), app. doc. No. 79-1575 (1st Cir.); *Suffolk Outdoor Adv. v. Hulse*, 43 N.Y.2d 483, 373 N.E.2d 263 (1977), app. dism. 439 U.S. 808 (1978); *Inhabitants of the Town of Boothbay & State of Maine v. National Advertising Co.*, Me. 347 A.2d 419 (1975); *John Donnelly & Sons v. Outdoor Advertising Bd.*, 369 Mass. 206, 339 N.E.2d 709 (1975); *In the Matter of Cromwell v. Ferrier, supra*, 19 N.Y.2d 263, 225 N.E.2d 749; *United Adv. Corp. v. Borough of Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964); *United Adv. Corp. v. Borough of Raritan*, 11 N.J. 144, 93 A.2d 362 (1952).

public nuisance theory.[26] California Civil Code Section 3479 defines a nuisance as:

> Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. . . .

California courts have held that billboards may constitute a public nuisance and be prohibited and removed.[27]

Nor is it a valid ground of attacking an ordinance to say that its objectives may be achieved by some means less than a prohibition, for as the court stated in *Hadacheck v. Sebastian,*239 U.S. 394, 413-414 (1915):

> . . . It may be that something else than prohibition would have satisfied the conditions. Of this, however, we have no means of determining, and besides, we cannot declare invalid the exertion of a power which the city undoubtedly has because of a charge that it does not exactly accommodate the conditions, or that some other exercise would have been better or less harsh[28]. . . .

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26 *City of Bakersfield v. Miller,* 64 Cal.2d 93 (1966).

27 *City of Escondido v. Desert Outdoor Adv., Inc., supra,* 8 Cal.3d 785, 790; *People ex rel Dept. Pub. Wks. v. Adco Advertisers,* 35 Cal.App.3d 507, 511 (1973). There also exists authority in support of the proposition that billboard owners do not possess a property right but are seizing for private benefit an opportunity created for a quite different purpose by the expenditure of public money in the construction of public ways. *Packard v. Banton,* 264 U.S. 140, 144 (1923); *General Outdoor Adv. Co. v. Dept. of Pub. Wks.,* 289 Mass. 149, 193 N.E. 799, 808 (1935); *Kelbro, Inc. v. Myrick,* 113 Vt. 64, 30 A.2d 527, 530 (1943); *Moore v. Ward, supra,* 377 S.W.2d 881, 887; *Metromedia, Inc. v. City of Pasadena, surpa,* 216 Cal.App.2d 270, 276-277.

28 See also *Village of Belle Terre v. Boraas, supra,* 416 U.S. 1, 4, quoting from *Village of Euclid v. Ambler Realty Co., supra,* 272 U.S. 365, and *Powell v. Pennsylvania, supra,* 127 U.S. 678, 685.

Furthermore, as will be discussed in the next section, the evils created by billboards cannot be eliminated by lesser means without rendering them ineffective in achieving their intended purpose of reaching thousands of motorists.

II

THE ORDINANCE DOES NOT VIOLATE FIRST AMENDMENT RIGHTS

A. The Ordinance Is A Time, Place And Manner Regulation And Is Not Based Upon Content Of Speech

It is settled that reasonable regulations of the time, place or manner of constitutionally protected speech, where necessary to further significant governmental interests, are permitted by the First Amendment. *Young v. American Mini Theatres, Inc., supra,* 427 U.S. 50, 64, n. 18, and cases cited therein.

Similarly, the Court has held that when speech and nonspeech elements are combined in a course of conduct, an important governmental interest in regulating the nonspeech aspect can justify incidental limitations on First Amendment freedoms. *United States v. O'Brien, supra*, 391 U.S. 367, 376.

In reviewing such a time, place or manner restriction the Court has required that it satisfy three criteria: (1) it must be justified without reference to the content of speech; (2) it must serve a significant governmental interest; and (3) it must leave open ample alternative channels for communication of the information. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* 425 U.S. 748, 771.

The ordinance here does not seek to prohibit any particular message based upon its content. Its objectives, traffic safety and aesthetics (among others), are unrelated to the subject of an advertisement and are sought to be achieved by prohibiting a particular manner of utilizing outdoor advertising (use of permanent structures and signs adjoining highways to attract the attention of motorists).

This Court in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94, n. 7 (1977) expressly distinguished regulations to promote aesthetic values or other values unrelated to the suppression of free expression stating:

> . . . we do not decide whether a ban on signs or a limitation on the number of signs could survive constitutional scrutiny if it were unrelated to the suppression of free speech.

Metromedia argues that the ordinance is based upon content because it exempts both on-site signs and signs relating to specified subjects (Br. p. 32).[29] However, these exemptions are not based upon the content of the message but upon the location, type and manner of use of the signs.

On-site signs are linked to specific property and its use. Such accessory uses are utilized differently and are strictly regulated by a separate ordinance.[30] They may also be the only means of identifying a business.[31] Temporary political campaign signs and their supporting

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29 This issue is raised only in the context of the First Amendment. Amicus Pacific Legal Foundation improperly attempts to expand the questions presented by arguing denial of equal protection of the laws (at p. 13). See Jur. Stmt. 8, fn.

30 See note 11, *supra*.

31 The courts have recognized such distinctions between on-site and off-site signs and have rejected attacks against such classification both in the First Amendment and equal protection contexts. *Young v. American Mini Theatres,*

(Footnote 31 continued on page 21)

structures are limited in duration and may not utilize huge permanent structures. The other categories of exempted signs are necessary to carry out governmental functions, or are distinguishable based upon their location, relationship to distracting motorists and permanence.

The Court has recognized that even time, place or manner restrictions may be based upon the content of the speech. "Even within the area of protected speech, a difference in content may require a different governmental response." *Young v. American Mini Theatres, supra,* 427 U.S. 50, 66. The *Young* case also recognized that "the content of a particular advertisement may determine the extent of its protection." (*Id.* at 68.)[32]

In reference to its recent decision (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, supra*, 425 U.S. 748) rejecting the notion that commercial speech is wholly outside the protection of the First Amendment, this Court stated:

> We have not discarded the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. . . . we instead have afforded commerical speech a limited

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Footnote 31 continued

supra, 427 U.S. 50, 68; *Railway Express Agency, Inc. v. New York, supra,* 336 U.S. 106, 110, 114, 116; *Fifth Avenue Coach Co. v. City of New York,* 221 U.S. 467, 484 (1911); *State of Washington v. Lotze, supra,* 593 P.2d 811, 814-815; *Markham Adv. Co. v. State*, 73 Wash.2d 405, 439 P.2d 248, 256 (1968) app. dism. 393 U.S. 316 (1969); *Metromedia, Inc. v. City of Pasadena, supra,* 216 Cal.App.2d 270, 274; *United Adv. Corp. v. Borough of Raritan, supra,* 93 A.2d 362, 365-366; *E. B. Elliot Adv. Co. v. Metropolitan Dade County, supra*, 425 F.2d 1141, 1154.

[32] See also *Consolidated Edison Co. v. Public Service Com. of New York,* ____ U.S. ____, 65 L.Ed.2d 319, 332-333 (1980) (Justice Stevens concurring); *Carey v. Brown,* ____ U.S. ____, 65 L.Ed.2d 263, 284 (1980) (Justice Rehnquist dissenting).

> measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.
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> *Ohralik v. Ohio State Bar Assn., supra,* 436 U.S. 447, 455-456.

On the other hand, the Court has afforded political campaign speech the utmost constitutional protection. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).[33]

The underlying reason for the rule prohibiting regulation based upon content of communication is the need for absolute neutrality by the government. The regulation may not be affected by sympathy or hostility for the point of view being expressed.[34]

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[33] See also *Baldwin v. Redwood City,* 540 F.2d 1360 (9th Cir. 1976), cert. den. 431 U.S. 913 (1977) where the court relied upon the nature of election signs, which are temporary and occur infrequently, in invalidating certain restrictions. By excepting temporary campaign signs from the ordinance's prohibition appellant argues it is invalid because based on content and under-inclusive. But the distinction is based upon the nature and mode of utilizing such signs, rather than their content. Furthermore, due to their preferred position, "action by a State taken to observe one prohibition of the constitution does not entail the violation of another." *Packer Corp. v. Utah, supra,* 285 U.S. 105, 109; *Carey v. Brown, supra,* ____ U.S. ____, 65 L.Ed.2d 263, 282 (Justice Rehnquist dissenting). A similar argument that such an ordinance was under-inclusive in view of the objectives sought (traffic safety and aesthetics) because certain signs were permitted was rejected in *State of Washington v. Lotze, supra,* 593 P.2d 811, 814-815. See also *Railway Express Agency, Inc. v. New York, supra,* 336 U.S. 106, 109-110, 112-117.

[34] *Young v. American Mini Theatres, supra,* 427 U.S. 50, 67; *Consolidated Edison v. Public Service Com. of New York, supra,* ____ U.S. ____, 65 L.Ed.2d 319, 327. As stated by Frankfurter, J., concurring, in *Kovacs v. Cooper, supra,* 336 U.S. 77, 97: "So long as a legislature does not prescribe

(Footnote 34 continued on page 23)

Here it is plain that the regulations are content neutral and the distinctions based on the type and mode of use of signs are only indirectly, if at all, related to the content.[35] Here we have a zoning ordinance which regulates land uses (billboard structures) which are unrelated to the property on which they are located and which involve large permanent structures with lasting effects on property, streets and persons.

In *Young v. American Mini Theatres, supra,* 427 U.S. 50, the Court had the opportunity to review First Amendment rights implicated by a zoning ordinance. Mr. Justice Powell, concurring, stated at 76:

> Respondents would have us mechanically apply the doctrines developed in other contexts. But this situation

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(Footnote 34 continued)

what ideas may be noisily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace, it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection. Without such opportunities freedom of thought becomes a mocking phrase, and without freedom of thought there can be no free society."

35 *United States v. O'Brien, supra,* 391 U.S. 367, 382; *Smith v. Goguen,* 415 U.S. 566, 595 (1974) (Justice Rehnquist dissenting). Cf. cases relied on by appellant where restrictions were specifically aimed at suppressing the particular message: *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975); *Bigelow v. Virginia,* 421 U.S. 809 (1975); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, supra,* 425 U.S. 748; *Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 U.S. 85; *Carey v. Population Services International,* 431 U.S. 678 (1977); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *Central Hudson Gas & Electric Co. v. Public Service Com.,* ____ U.S. ____, 65 L.Ed.2d 341 (1980). The Court's enunciation of a four-part analysis in *Central Hudson* is applicable where the regulation is based upon content of the speech. Justice Blackmun in his concurring opinion points out that the majority opinion represents a lessening of First Amendment protection to commercial speech by permitting content based regulation if the four part test is met.

> is not analogous to cases involving expression in public forums or to those involving individual expressions or, indeed, to any other prior case. The unique situation presented by this ordinance calls, as cases in this area often do, for a careful inquiry into the competing concerns of the State and the interests protected by the guarantee of free expression.

Similarly Mr. Justice Frankfurter, concurring in *Kovacs v. Cooper, supra,* 336 U.S. 77, 90, 96, voiced concern over use of the phrase "the preferred position of freedom of speech," if it carried the thought that any law touching communication is infected with presumptive invalidity. In that regard he said, after analyzing the Court's First Amendment cases:

> The objection to summarizing this line of thought by the phrase . . . is that it expresses a complicated process of constitutional adjudication by a deceptive formula. . . .
>
> Some of the arguments made in this case strikingly illustrate how easy it is to fall into the ways of mechanical jurisprudence through the use of over-simplified formulas. It is argued that the Constitution protects freedom of speech: freedom of speech means the right to communicate, whatever the physical means for so doing; sound trucks are one form of communication; *ergo* that form is entitled to the same protection as any other means of communication, whether by tongue or pen. . . . The various forms of modern so-called "mass communications" raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison.[36]

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[36] Even if the Court were to agree with Metromedia that a closer scrutiny of the ordinance is warranted because First Amendment rights are asserted or that the burden is upon City to establish that the ordinance is related to the stated objectives, City contends that it has met such a requirement here. See *State of Washington v. Lotze, supra,* 593 P.2d 811, 813 (traffic safety and aesthetics are compelling state interests).

The same principle is applicable here. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place. *Grayned v. City of Rockford, supra,* 408 U.S. 104, 116. As stated in *Ohralik v. Ohio State Bar Assn., supra,* 436 U.S. 447, 456:

> . . . "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." (Quoting *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502 (1949).)

Appellant argues that since some noncommercial messages are displayed occasionally on its structures the Court should not construe the First Amendment to afford a lesser degree of protection as it may to commercial speech. In so doing, appellant ignores its unique means of advertising.[37]

Its structures are expensive and permanent, and but for the commercial aspects could not support noncommercial speech.[38] While the commercial nature of billboards may not place them beyond the First Amendment, it is a factor to be considered in the balancing of rights involved. *Breard v. City of Alexandria, supra,* 341 U.S. 622, 642. There exists a distinction between a regulation of speech itself and regulation of a commercial manner of exploiting speech.[39] As stated by

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[37] See Stipulation of Facts Nos. 13, 14, 22, 23, 24, 25 and 31 (J.A. 44a-49a).

[38] Brief of Appellants, 9, fn.; Jur. Stmt. 18, fn.; Amicus ACLU, 17-18.

[39] "[P]rofit-motivated or commercial speech lacks the crucial connections with individual liberty and self-realization which exist for speech generally, and which are central to justifications for the constitutional protection of speech, justifications which in turn define the proper scope of protection under the First Amendment." Baker, *Commercial Speech: A Problem in the Theory of Freedom,* 62 Iowa L.Rev. 1, 3 (1976). See also, *City Wide Prohibition of Billboards: Police Power and the Freedom of Speech,* 30 Hastings L.J. 1597 (1979).

the court in *Railway Express Agency, Inc. v. New York, supra,* 336 U.S. 106, 114, 116 (Justice Jackson concurring):

> That the difference between carrying on any business for hire and engaging in the same activity on one's own is a sufficient one to sustain some types of regulations of the one that is not applied to the other, is almost elementary. . . .
>
> . . . there is a real difference between doing in self-interest and doing for hire, so that it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be promoted for a price.

Furthermore, the message on these signs is of a very limited nature, sometimes reduced to a mere picture or brand name.

In sum, billboards are a specialized form of commercial advertising. Occasional displays of a noncommercial nature are merely incidental to a commercial enterprise and are commercially motivated.

As stated in *Packard v. Banton, supra,* 264 U.S. 140, 144:

> The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary and, generally at least, may be prohibited or conditioned as the legislature deems proper.

Billboards have long been recognized by the courts to create special problems due to their very nature and their intrusive aspects.[40] They have also been recognized to rely upon a captive audience.

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[40] *Thomas Cusack Co. v. Chicago, supra,* 242 U.S. 526, 529; *St. Louis Poster Adv. Co. v. St. Louis,* 249 U.S. 269, 274 (1919); *Packer Corp. v. Utah, supra,* 285 U.S. 105, 110; *State of Washington v. Lotze, supra,* 593 P.2d 811, 812; *Veterans of Foreign Wars v. Steamboat Springs,* 575 P.2d 835 (1978), app.

(Footnote 40 continued on page 27)

> Advertisements of this sort are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice or volition. . . . Other forms of advertising are ordinarily seen as a matter of choice. . . . The . . . people . . . have those of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by one who is to see and read the

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(Footnote 40 continued)

dism. 439 U.S. 809 (1978). As pointed out by the California Supreme Court (J.S. App. A 18a-20a) many decisions have upheld laws prohibiting billboards rejecting First Amendment attacks: *Howard v. State Dept. of Hwys. of Colorado*, 478 F.2d 581 (10th Cir. 1973); *John Donnelly & Sons v. Mallar, supra*, 453 F.Supp. 1272 (D.Me. 1978) app. doc. No. 79-1575 (1st Cir. 1979); *John Donnelly & Sons, Inc. v. Outdoor Adv. Bd., supra*, 369 Mass. 206, 339 N.E.2d 709; *Donnelly Advertising Corp. v. City of Baltimore*, 279 Md. 660, 370 A.2d 1127 (1977); *United Advertising Corp. v. Borough of Raritan, supra*, 11 N.J. 114, 93 A.2d 362; *Stuckey's Stores, Inc. v. O'Cheskey*, 93 N.M. 312, 600 P.2d 258 (1979), app. dism. 64 L.Ed.2d 783 (1980); *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935 (1978), cert. den. 444 U.S. 833 (1979); *Ackerley Communications, Inc. v. City of Seattle*, 92 Wash.2d 905, 602 P.2d 1177 (1979), app. dism. ____ U.S. ____ (1980); *Markham Advertising Co. v. State, supra*, 73 Wash.2d 405, 439 P.2d 248 (1968), app. dism. 393 U.S. 316 (1969). While some of these decisions predate the Court's recognition that commercial speech is not wholly outside of First Amendment protection, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra*, 425 U.S. 748, three recent cases specifically discussed that case in rejecting First Amendment attacks: *Suffolk Outdoor Advertising Co. v. Hulse, supra*, 43 N.Y.2d 483, 373 N.E.2d 263 (1977), app. dism. 439 U.S. 808 (1978); *Newman Signs, Inc. v. Hjelle, supra*, 268 N.W.2d 741, app. dism. 440 U.S. 901; *State of Washington v. Lotze, supra*, 593 P.2d 811, app. dism. 444 U.S. 921.

> advertisement. The radio can be turned off, but not so the billboard. . . .
>
> *Packer Corp. v. Utah, supra,* 285 U.S. 105, 110.[41]

The Court has recognized that there must be a delicate balancing where rights of free speech and privacy clash. *Erznoznik v. City of Jacksonville, supra,* 422 U.S. 205, 208.

As stated in *Kovacs v. Cooper, supra,* 336 U.S. 77, 88-89:

> The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. That more people may be more easily and cheaply reached by sound trucks . . . is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.

Here, the very nature of the billboard--its location, size and design is such that it is virtually impossible for a motorist to avoid exposure if he chooses.[42]

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[41] *Packer* was cited with approval by the Court in *Lehman v. City of Shaker Heights,* 418 U.S. 298, 302 (1974), relying on the fact that a captive audience was involved there also. In his concurring opinion Justice Douglas stated that a highway was not a public forum for speech and said: "Petitioner overlooks the constitutional rights of the commuters. . . . he has no right to force his message upon an audience incapable of declining to receive it." (*Id.* at 307.)

[42] Cf. *Erznoznik v. City of Jacksonville, supra,* 422 U.S. 205, 211-212; *Bigelow v. Virginia, supra,* 421 U.S. 809, 828; *Consolidated Edison Co. v. Public Service Com. of New York, supra,* ____ U.S. ____, 65 L.Ed.2d 319, 330. The instrusive quality of a billboard is precisely what enables Metromedia to argue that they are a unique means of communication and are very cost

(Footnote 42 continued on page 29)

B. The Ordinance Serves Significant Governmental Interests

As stated previously, the Court has left little doubt that aesthetics and traffic safety are significant governmental interests.[43]

C. Alternative Channels Of Communication Are Available

Contrary to Metromedia's contention, City has not stipulated that there are no adequate alternative means of communication. The stipulation relied on does not state and was never intended to mean that *all* forms of advertising other than Metromedia's are unavailable, insufficient, inappropriate or prohibitively expensive. Certainly some of these problems may exist in relation to some of the alternative means in certain circumstances.[44] For example, expense may be a major factor in

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(Footnote 42 continued)

efficient. Their efficiency is equated to exposure to thousands of motorists (of course exposure does not necessarily mean people are swayed by the message). On the other hand, the nature of temporary political posters in such that they may be avoided by motorists. *Baldwin v. Redwood City, supra,* 540 F.2d 1360, 1367. As stated in *Kovacs v. Cooper, supra,* 336 U.S. 77, 86-87, "The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud-speaker except through the protection of the municipality."

[43] In addition to the authority cited in Section I A herein, see *Young v. American Mini Theatres, supra,* 427 U.S. 50, 62-63, 80; *Village of Belle Terre v. Boraas, supra,* 416 U.S. 1, 5-6; *Berman v. Parker,* 348 U.S. 26, 33 (1954). As stated in *United States v. O'Brien, supra,* 391 U.S. 367, 376-377, the quality of the governmental interest has been characterized by the use of a variety of descriptive terms (compelling, substantial, subordinating, paramount, cogent, strong) which basically mean an "important or substantial governmental interest."

[44] The same is true as to any media when compared to another.

connection with radio, television or national magazine advertising. But it is ludicrous to argue that the expense is prohibitive in connection with leafleting, posters or other outdoor advertising specifically allowed by the ordinance for example.

The Court is capable of taking judicial notice of commonly known facts which dispute Metromedia's interpretation of the stipulation.

The fact that many people rely on billboard advertising does not imply that it is any more effective than alternatives or that they do not also rely upon alternatives.

Furthermore, subsequent to the parties entering into the stipulation the ordinance was amended to add the significant exception of temporary political campaign signs, thereby increasing the types of signs allowed.[45]

Thus the ordinance allows numerous means of communication by signs; *e.g.,* on-site signs, bus bench signs, signs within malls, courts, etc., and signs on vehicles,[46] in addition to other media.

Metromedia also argues that the ordinance cannot be sustained as a time, place or manner regulation because it is a total prohibition of a

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[45] Jur.App. A 3a, n. 1. Appellants miss the point in arguing that this exception is illusory because of the expense involved in erecting a billboard structure (Jur.Stmt. 18, fn.) and that the effect of the ordinance would preclude billboards from being used for noncommercial purposes. This exception was not intended to allow a billboard type sign (huge, permanent structure thrust upon motorists), but is intended to allow a typical campaign sign or poster, temporary in nature and very inexpensive. In fact, a politician may argue that only the wealthy politician can afford a billboard ad.

[46] The California Supreme Court further narrowed the type of signs proscribed by the ordinance by adopting a narrow interpretation of "outdoor advertising display signs." (Jur.Stmt. A 3a-4a, n. 2.)

medium not narrowly drawn and to sanction such would allow the elimination of each alternative medium. (Br. 30-31.)

Metromedia characterizes the manner in which its signs are used as a distinct communications medium and argues City has eliminated a medium of communication,[47] which the courts will not sanction. The cases relied upon are inapposite.

In the sound truck cases cited by Metromedia (Br. 23-24) the Court would not sanction total elimination where the evil could be eliminated through narrowly drafted regulations such as limits on the time of use and noise level. If the Court were to have concluded that under no circumstances could the adverse effects of sound tracks be controlled it certainly would not have saved them on the rationale that they are a medium of communication and can't be eliminated. *Kovacs v. Cooper, supra,* 336 U.S. 77, 85.

Likewise, the leafleting cases are distinguishable in that where littering is deemed to be undesirable, laws may be passed making it illegal to litter, it is transitory in nature and passers-by are not forced to take them. The courts have distinguished between the prohibition of commercial handbills (held unconstitutional in *People v. Remeny,* 40 N.Y.2d 527, 355 N.E.2d 375 (1976)) and the prohibition of all off-site billboards (held valid by the same court in *Suffolk Outdoor Adv. Co., Inc. v. Hulse, supra,* 43 N.Y.2d 483, 474 N.E.2d 263) because of these distinguishing factors.

Here, we have a situation where a permanent structure and sign are forever present, seeking the attention of every motorist at "full volume."

They obviously cannot be regulated as to time, nor degree of ability to attract. In fact, any regulation which diminishes their ability to

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[47] City contends that outdoor signs is the medium. This is another version of the "prohibition versus regulation" argument discussed in Section I B herein.

attract the attention of every one of thousands of motorists at all times of the day and night would reduce their effectiveness to the level of signs allowed by the ordinance and which Metromedia claims are inadequate means of communication. Thus it is the very nature of the beast which makes it such an efficient means of advertising according to Metromedia and its amici,[48] which also necessarily cause the secondary harmful effects sought to be eliminated by the ordinance. The Court has not sanctioned the captive audience means of communication for other media under the guise that it is more efficient, and should not do so here.

It was for this reason that the California Supreme Court found the line of cases relied upon by Metromedia (Br. 22-24) requiring narrowly drawn regulations to not be controlling here, saying:

> Unlike leaflets, newspapers, and the like, a billboard is a large, immobile and permanent structure which like other structures is subject to zoning regulation. The city's right to regulate the commercial use of property, and to ban uses which imperil traffic safety or denigrate the appearance of the community justifies restrictions which go beyond those imposed upon more transitory or less obtrusive media.[49]

Thus, other means of communication may have detrimental effects but they can be regulated. Furthermore, they are temporary and their effects nonlasting, but not so the billboard.

Metromedia also argues that the speaker's choice is important in that he must have the opportunity to reach the minds of willing listeners. (Br. 25.) While the speaker's choice is important, so is the listener's,

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[48] See Brief of Appellant, 25, fn.; amicus Outdoor Advertising Association of America, 7.

[49] Jur.App. A 24a.

especially where he is not willing and has no choice if he uses the public highways and streets.[50]

Nor is the discussion in *Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 U.S. 85, 93, cited by Metromedia (Br. 26) as to adequacy of alternative channels relevant here. In *Linmark* the Court concluded the alternatives were "far from satisfactory" because real estate is not marketed through those other means and is less likely to reach persons seeking the information. Here, however, Metromedia cannot claim that the messages on its billboards cannot or are not in fact customarily conveyed by the alternative channels. Additionally, people do not go out and drive around to obtain information on billboards, especially with today's price of gasoline.

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[50] As cited in *Lehman v. City of Shaker Heights, supra,* 418 U.S. 298, 306, n. 2: "In a survey of motorists in Ohio, 71% expressed the opinion that billboards should be banned from the interstate highway system." See also Dowds, *Private Signs and Public Interests*, Institute on Planning, Zoning and Eminent Domain, 231, 233 (1974).

CONCLUSION

In view of the peculiar nature and use of the billboard, it should be apparent that what is at issue here is not the equivalent of other communications media. We are not dealing with transitory means of communication with minor annoyances of short duration.

The Court should therefore cast a wary eye at standardized formulas in reviewing the First Amendment protection to be afforded to billboards.

The California Supreme Court carefully analyzed the competing interests involved in upholding the ordinance. It is respectfully requested that this Court affirm that decision.

Respectfully submitted,

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